

ORIGINAL

FILED

December 31 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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**JUDICIAL STANDARDS COMMISSION
STATE OF MONTANA**

INQUIRY CONCERNING COMPLAINT OF:)
)
JUDICIAL STANDARDS COMMISSION,)
Complainant)
vs.)
)
LEROY NOT AFRAID,)
Respondent.)


No. PRO9- 0639

**RESPONDENT'S MOTION TO
DISMISS FORMAL
COMPLAINT**

COMES NOW Leroy Not Afraid, Respondent, by his attorney William J. Eggers III, who moves to dismiss the Formal Complaint.

Respondent's Motion to Dismiss is based upon the Fort Laramie Treaty of 1868, the United States Constitution, the Montana Constitution, Compact of 1889 and statutes, and the Memorandum in Support of Motion, which is attached hereto and incorporated by reference herein, and the record and files in this matter.

DATED this 30th of December, 2009.

EGGERS LAW FIRM
By: 
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Attorney for Leroy Not Afraid

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**JUDICIAL STANDARDS COMMISSION
STATE OF MONTANA**

INQUIRY CONCERNING COMPLAINT OF:)	
)	No. PRO9- <u>0639</u>
JUDICIAL STANDARDS COMMISSION,)	
Complainant,)	RESPONDENT'S
)	MEMORANDUM IN
)	SUPPORT OF MOTION
vs.)	TO DISMISS
)	
LEROY NOT AFRAID,)	
Respondent.)	

I. INTRODUCTION

This disciplinary action against Judge Not Afraid arose out of a formal complaint filed against him by the Judicial Standards Commission of the State of Montana. Judge Not Afraid (hereinafter "Respondent") has filed an answer to the formal charges denying any and all alleged violations of the Montana Constitution, the Montana Code of Judicial Conduct, the Rules of Judicial Standards or any other constitutional provision, state statute, rule, code, regulation, or requirement that would subject him to discipline or bar him from continuing to serve as an elected Justice of the Peace for Big Horn County, Montana.

The alleged charges arise out of Respondent's running for the elective Tribal office of Tribal Chairman of the Crow Indian Tribe of Montana in 2009. The Judicial Standards Commission claims that the clause in the Montana Constitution that provides: "Any holder of a judicial position forfeits

that position by filing for an elective public office other than a judicial position ...”¹ applies to Respondent, and based upon the facts Respondent is subject to be disciplined.

Respondent contends that the Judicial Standards Commission has violated Respondent’s constitutional rights, incorrectly defined “elective public office” as applied to Respondent, and improperly applied the above clause to Respondent, such that the Formal Complaint should be dismissed sua sponte on the grounds as more fully set forth herein below.

II. POINTS AND AUTHORITIES

Respondent contends that the enforcement of the forfeiture clause of the Montana Constitution (Article VII, Section 10) upon him constitutes:

- A. A violation of the supremacy clause of the United States Constitution,
a violation of the federal government’s right of preemption over Indian matters,
a violation of and interference with the Crow Tribe’s right of self government, and thus a treaty violation, and
a violation of Respondent’s right to participate in the political activities of his tribe.
- B. A wrongful and erroneous interpretation and application of “elective public office” as applied to Respondent.

A. VIOLATION OF SUPREMACY CLAUSE

First, Respondent would like to address the subject of federal preemption, to demonstrate that Respondent’s contention that the Commission’s enforcement of Article VII, Section 10 upon Respondent, is erroneous and legally impermissible.

Article VI of the United States Constitution contains the supremacy clause which asserts the basic primacy of the Constitution and national laws over state laws and constitutions. The supremacy clause provides that the “Constitution, and the laws of the United States” as well as all treaties are to be the supreme law of the land. All national and state officers and judges are bound by national law and take oaths to support the federal constitution above any state law or

constitution. Because of the supremacy clause, any legitimate exercise of national power supersedes any state laws or action, in a process that is called preemption.²

The federal preemption over Indian Tribes bars the State of Montana and the Judicial Standards Commission (“Commission”) from taking the disciplinary action against Respondent on the grounds set forth in the Formal Complaint and bars the Commission from imposing any disciplinary sanctions against Respondent.³

The Crow Tribe of Indians was recognized by treaty by the federal government of the United States in the Treaties of 1821, 1851, and 1868. In the United States Supreme Court’s decision in the case of Cherokee Nation³, Chief Justice John Marshall writing for the majority of the Court, determined that the Cherokee Nation had adequately demonstrated that it was a state, “a distinct political society separated from others, capable of managing its own affairs and governing itself” and that the treaties between the tribe and the United States had so recognized it. Marshall’s opinion held that “They (tribes) may, more correctly perhaps, be denominated domestic dependent nations...Meanwhile, they are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian...” (Emphasis added.) The Crow tribe enjoys the same status as the Cherokee nation.

In the U.S. Supreme Court decision of Worcester⁴, Chief Justice Marshall wrote “The Indian Nations had always been considered as distinct, independent, political communities, retaining their original natural rights...,” limited only in their conveyance of land and their right to deal with foreign powers. Because a tribe is sovereign, it is different from the other states in the union, or from a city or a political subdivision of a state. A tribe is its own source of power, separate and exclusive from the states of the union. Tribal powers are inherent and not derived from a state. The Crow Tribe is included in the above definition and judicial description.

It is well established that the power of the United States government is supreme over Indian Tribes and that the State of Montana is preempted from any exercise of jurisdiction over Indian tribes and over tribal members on reservations and within its borders. The limitation on the State of Montana from extending State jurisdiction into Indian reservations and over tribal members is found in the Compact between the State of Montana and the United States. The Compact states in pertinent part "...all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana...." ⁶ This includes the Crow Tribe.

It is well established that tribes "owe no allegiance to the states, and receive from them no protection..." There is no question that Congress exercises plenary power over Indian tribes ⁷.

Based upon the foregoing treaties, the U.S. Constitution, the Compact, and U.S. Supreme Court authority, Respondent contends that the Commission's application of Article VII, Section 10 of the Montana Constitution upon him is improper and punitive. It is improper in that the Commission, by imposing the State Constitutional condition on Respondent violates the Compact, usurps the legal authority of the federal government, violates the Constitution of the Crow Indian Tribe, and interferes with Respondent's constitutional right as a Crow tribal member under the constitution of the Crow Tribe, a domestic dependent nation, to run for tribal elective office. The State does not have the legal right or authority to force Respondent to make a choice between forfeiting his judicial position and running for Tribal office.

The force and effect of the Commission's enforcement of Article VII, Section 10 upon Respondent directly interferes with Crow Tribal sovereignty. In Worcester, supra, the Court held that state laws "have no force" in Indian country. This Court stated that the question for the Court

was “whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them.”⁸ Respondent contends that is exactly what the Commission’s letters to Respondent and now the Formal Complaint does.

B. WRONGFUL AND ERRONEOUS INTERPRETATION AND APPLICATION OF THE TERM “ELECTIVE PUBLIC OFFICE”

Respondent’s second contention that the Formal Complaint should be dismissed is that the Commission has incorrectly and improperly defined and applied “elective public office” to Respondent. The office of Crow Tribal Chairman is not an “elective public office” as contemplated by the drafters of the Montana Constitution, nor as currently defined by the existing Montana statutes and laws of the United States. Statutory definitions found in the Montana Code are helpful, for example:

MCA- ELECTIONS-13-1-101. Definitions. As used in this title, unless the context clearly indicates otherwise, the following definitions apply:

(6) "Candidate" means:

(a) an individual who has filed a declaration or petition for nomination, acceptance of nomination, or appointment as a candidate for public office as required by law;

(8) "Election" means a general, regular, special, or primary election held pursuant to the requirements of state law, regardless of the time or purpose.

(13) "General election" or "regular election" means an election held for the election of public officers throughout the state at times specified by law, including elections for officers of political subdivisions when the time of the election is set on the same date for all similar political subdivisions in the state. For ballot issues required by Article III, section 6, or Article XIV, section 8, of the Montana constitution to be submitted by the legislature to the electors at a general election, "general election" means an election held at the time provided in 13-1-104(1). For ballot issues required by Article XIV, section 9, of the Montana constitution to be submitted as a constitutional initiative at a regular election, regular election means an election held at the time provided in 13-1-104 (1).

(28) "**Public office**" means a state, county, municipal, school, or other district office that is filled by the people at an election.¹²

(Emphasis added.)

Tribal elections are not subject to the Montana's voting systems laws.⁹

Respondent did not run for an "elective public office" as defined or contemplated by the Montana Constitution or statutes.

There is no question that the "elective public office" reference in Article VII, Section 10 of the Montana Constitution, refers exclusively and specifically to the elective public offices of the State of Montana and not to the elective public offices of the Crow Tribe or the federal government. The State of Montana in the case at bar is seeking to enforce its laws upon Respondent and the Crow Tribe through its Commission. The Commission has no greater right or authority than does the State of Montana. As regards the State of Montana's right and authority over Indian Tribes within the state, Montana's rights and authority over Montanan Indians is preempted by the federal government. It is illegal for the Commission to seek to expand the definition of "elective public office" to include a tribal elective office within the State of Montana. It is illegal for the Commission to seek to apply the laws of the State of Montana upon an enrolled Crow tribal member, who resides on the Crow reservation, who lawfully seeks tribal elective office under the Crow Constitution. The Formal Complaint ignores the fact that the Crow Tribe is a domestic dependent nation and that an elective tribal office is not synonymous with a state elective public office.¹⁰ An elective tribal office is not an "elective public office" as defined by Montana statute.

III. CONCLUSION

Based upon the foregoing points and authorities, it is clear that the Formal Complaint has the force and effect of violating the federal Constitution, the federal preemption policy, and U.S.

Supreme Court decisions. The Commission improperly and incorrectly defines "elective public office" and seeks to enforce its wrongful interpretation of the Montana Constitution upon Respondent, thus violating his individual rights. The Motion to Dismiss should be granted and the Formal Complaint be Dismissed.

Respectfully Submitted.

Dated: December the 30th, 2009.

Eggers Law Firm

By: 

William J. Eggers III

CITATIONS TO


MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

1. Montana Constitution, Article VII, Section 10
2. American Government, O'Connor and Sabato, 2008, Pearson Longman, p. 52
3. McCullough v Maryland, 17 U.S. 316 (1819); Gibbons v Ogden, 22 U.S. 1 (1824)
4. Cherokee Nation v Georgia, 30 U.S. (5 Pet.) 1 (1831)
5. Worcester v Georgia, 31 U.S. (6 Pet.) 515, 559, (1832).
6. Constitution of Montana -- Article I -- COMPACT WITH THE UNITED STATES
All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.
7. Lone Wolf v Hitchcock, 187 U.S. 553 (1903).
8. Worcester, 358 U.S. at 219-220.
9. 13-17-101. Secretary of state to approve voting systems. (1) A voting system may not be used for any election in this state unless the system is approved by the secretary of state as provided in this section.
(2) The secretary of state shall:
(a) examine a voting system proposed for use to determine if it complies with the requirements of 13-17-103;
10. 13-37-101. Definitions. As used in this chapter, unless the context clearly indicates otherwise, the following definitions apply:
(2) "Public office" has the meaning provided in 13-1-101.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2009, a copy of Respondent's Motion to Dismiss Formal Complaint, Memorandum in Support of Motion, Citations Reference, and this Certificate of Service was served by U.S. Mail (first class postage) on the following person:

Geoffrey R. Keller
Matovich, Keller & Murphy, PC
PO Box 1098
Billings, Montana 59103-1098

By: 
William J. Eggers III
Attorney for Leroy Not Afraid